IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

MICHAEL R. CARTER,
Petitioner,

v.

RONALD ANGELONE, DIRECTOR
DEPARTMENT OF CORRECTIONS,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the petitioner Michael R. Carter, by counsel, pursuant to 28 U.S.C. 2254 and files the following as his petition for habeas corpus.

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

The Grand Jury for the City of Salem returned a four count indictment on February 21, 1997, charging Mr. Carter with one count each of rape, abduction, malicious bodily injury and statutory burglary. Mr. Carter plead not guilty and was tried in the Circuit Court for the City of Salem before a jury on August 13-15, 1997 with the Honorable Roy B. Willett presiding.

Prior to trial, the Commonwealth moved to nolle prosequi the charge of abduction. The Court granted the motion of the Commonwealth.

At the conclusion of the evidence, the Court granted Mr. Carter's motion to strike the charge of statutory burglary.

The jury found Mr. Carter guilty of malicious bodily injury and not guilty of rape. Following a sentencing hearing, the jury recommended a sentence of eleven years

incarceration and a $20,000 fine.

During the sentencing hearing on September 10, 1997, the trial court imposed the jury's recommended sentence of eleven years.

Mr. Carter appealed this conviction to the Court of Appeals of Virginia on November 10, 1998. Mr. Carter's appeal was denied by the Court of Appeals of Virginia on March 24, 1998. Mr. Carter appealed his conviction to the Supreme Court of Virginia on July 29, 1998. Mr. Carter's appeal to the Supreme Court of Virginia was denied on November 3, 1998. Mr. Carter's demand for re-hearing before the Supreme Court of Virginia was denied on January 8, 1999.

Mr. Carter filed a petition for writ of habeas corpus in the Circuit Court for the City of Salem on January 7, 2000. The respondent filed a motion to dismiss the petition for writ of habeas corpus on February 8, 2000. Mr. Carter's petition for writ of habeas corpus was denied without a hearing by the Circuit Court of the City of Salem by order dated February 11, 2000. Mr. Carter filed a timely appeal to the Supreme Court of Virginia which was denied by order dated August 7, 2000.

ISSUES PRESENTED

1. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT'S MOTION TO DISMISS AS IT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY VIRGINIA CODE 8.01-654(B)(5).

2. TRIAL COUNSEL'S FAILURE TO INTERVIEW POTENTIAL WITNESS RANDALL MONGER CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

3. TRIAL COUNSEL'S FAILURE TO INTERVIEW POTENTIAL WITNESSES MARK WHITE, LEWIS RICHARD HAWKINS AND RANDY HAWKINS CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

4. TRIAL COUNSEL'S FAILURE TO CROSS-EXAMINE THE COMMONWEALTH'S WITNESSES WITH REGARD TO THEIR BIAS CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

5. TRIAL COUNSEL'S FAILURE TO CALL HARVEY LUTINS AS A WITNESS CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

6. TRIAL COUNSEL'S FAILURE TO REQUEST A CONTINUANCE IN SPITE OF THE FACT THAT TEN WITNESSES WHO WERE UNDER SUBPOENA FAILED TO APPEAR CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

STATEMENT OF FACTS

As the petitioner's allegations go to failure of his trial counsel to present various witnesses, testimony and evidence, a summary of the testimony in the trial court will not be included here. The evidence consisted of differing accounts of the events that lead to the charges against Mr. Carter. For purposes of this petition, it is sufficient to state that credibility of the prosecutrix was at issue.

The Commonwealth's case consisted almost entirely of the testimony of the complaining witness Lisa Aliff. Ms. Aliff testified regarding a series of incidents that allegedly occurred between herself and Mr. Carter and which gave rise to the criminal charges at issue.

The Commonwealth also presented testimony from Ms. Aliff's mother and father. The Commonwealth's final witness on direct examination was Detective Brookshier.

The Defense called a number of witnesses, including Mr. Carter, in an effort to impeach the credibility of Ms. Aliff.

During rebuttal, the Commonwealth called a medical examiner who testified regarding the injuries that were found on Ms. Aliff during her examination at the hospital. The Commonwealth also called two character witnesses who testified that Mr. Carter had a bad reputation in the community for truth and veracity.

ARGUMENT

1. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT'S MOTION TO DISMISS AS IT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY VIRGINIA CODE 8.01-654(B)(5).

The Circuit Court for the City of Salem dismissed Mr. Carter's petition for writ of habeas corpus without providing any legal or factual basis for its action. The Court's order simply states that, "...the court finds for the reasons stated in the motion to dismiss that the Petitioner is not entitled to the relief sought." The Court was required by Virginia Code Sec. 8.01-654(B)(5) to, "give findings of fact and conclusions of law following a determination on the record...." Simply adopting the argument of the Commonwealth based on two affidavits of trial counsel does not meet the requirements of Virginia Code Section 8.01-654(B)(5).

That the Court adopted the assertions of the respondent without doing a sufficiently independent review is demonstrated by its failure to recognize that at least one of the respondent's assertions was in plain error. In paragraph nine of the motion to dismiss, the respondent indicated that, "the transcript reveals that Petitioner advised the court prior to trial...that proper arrangements had been made to secure the witnesses attendance." In fact, trial counsel, not Mr. Carter, indicated to the court that arrangements had been made regarding the witnesses. Yet in spite of this significant and clear error, the trial court adopted the motion to dismiss as its own findings. This error highlights the fact that the trial court's review was insufficient and underscores the significance of the trial court's failure to comply with Virginia Code Section 8.01-654(B)(5).

The trial court's failure to meet the requirements of Virginia Code Section 8.01-654(B)(5) prevents Mr. Carter from effectively seeking review by this Court as the trial court has failed to provide the explanation of its decision that is required by Virginia law and by the Anti-Terrorism Effective Death Penalty Act which governs review of petitions for writ of habeas corpus in this Court.

As a result, Mr. Carter requests that this Court enter an order requiring the Circuit Court for the City of Salem to conduct an independent review of Mr. Carter's petition and render a decision that complies with Virginia Code Section 8.01-654(B)(5).

2. TRIAL COUNSEL'S FAILURE TO INTERVIEW POTENTIAL WITNESS RANDALL MONGER CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

In order to prove ineffective assistance of counsel under the *Strickland* standard, the petitioner must demonstrate that (1) "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment and that (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984).

Mr. Carter alleges that his counsel was ineffective for failing to interview a potential witness named Randall Monger. Mr. Carter made his counsel aware that the complaining witness, Ms. Aliff, had previously made false charges of rape against Mr. Monger that were very similar in nature to those made against Mr. Carter. Mr. Carter indicated repeatedly to his trial counsel that they needed to interview Mr. Monger and subpoena him for trial. In spite of

Mr. Carter's requests, his trial counsel never contacted Mr. Monger. Clearly, the evidence regarding the prosecutrix having made previous false claims would have been probative and admissible and would have had a strong impact on the jury.

Mr. Carter has shown under *Strickland* that he is illegally detained as a result of his counsel's failure to properly investigate his case. The failure of trial counsel to interview Mr. Monger can not be justified by any trial strategy. Had the trial counsel presented evidence of a similar past false accusation by the prosecutrix, there is a reasonable probability that the result of the proceeding would have been different.

In its motion to dismiss filed in the Circuit Court for the City of Salem, which the Court adopted, the Respondent below submitted affidavits from Mr. Carter's trial counsel. The Respondent relied on the blanket assertions of trial counsel in paragraphs four of each affidavit that they undertook an investigation of potential witnesses. Neither trial counsel stated that he even contacted Mr. Monger or that Mr. Monger was unwilling to or could not testify as Mr. Carter has indicated.

3. TRIAL COUNSEL'S FAILURE TO INTERVIEW POTENTIAL WITNESSES MARK WHITE, LEWIS RICHARD HAWKINS AND RANDY HAWKINS CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

In order to prove ineffective assistance of counsel under the *Strickland* standard, the petitioner must demonstrate that (1) "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment and that (2) there is a "reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Strickland v. Washington,* 466 U.S. 668, 687, 694 (1984).

Mr. Carter alleges that his trial counsel was ineffective under the *Strickland* standard for failing to interview Mark White, Lewis Richard Hawkins, Jr. and Randy Hawkins as potential witnesses.

Mr. Carter made his counsel aware of the fact that Richard Lewis Hawkins was willing to testify that Ms. Aliff had falsely accused him of assaulting her on August 26, 1993. Mr. Carter informed his trial counsel that Ms. Aliff accused Mr. Hawkins of having assaulted her and pulling out her hair. These allegations were strikingly similar to those made by Ms. Aliff against Mr. Carter.

Mr. Carter also made his trial counsel aware of the fact that Ms. Aliff had falsely accused Mr. Randy Hawkins of assault. Ms. Aliff did not even appear in court to testify against Randy Hawkins on the charge of assault that she brought against him. This information would have undermined the credibility of Ms. Aliff in the minds of the jurors by demonstrating that she had filed false criminal charges in the past and then failed to appear to prosecute the charges.

Lastly, Mr. Carter discussed with his trial counsel the availability of a witness named Mark White. Mr. White was willing to testify about the fact that he was falsely charged by Ms. Aliff with trespassing and stalking. These charges were eventually withdrawn. Again, this evidence would have had a significant impact on the jurors as it demonstrated Mr. Aliff's willingness to file false or unjustified criminal charges.

The failure of trial counsel to interview these three witnesses can not be justified by any trial strategy. Had trial counsel presented these witnesses, there is a reasonable probability that the outcome of the trial would have been different.

In its motion to dismiss filed in the Circuit Court of the City of Salem, which the Court adopted, the Respondent below presented affidavits of trial counsel. Both trial counsel assert in paragraphs four of each affidavit that they undertook an investigation of potential witnesses. Neither trial counsel states that he even contacted any of the three witnesses at issue.

4. TRIAL COUNSEL'S FAILURE TO CROSS-EXAMINE THE COMMONWEALTH'S WITNESSES REGARDING MR. CARTER'S CHARACTER WITH REGARD TO THEIR BIAS CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

In order to prove ineffective assistance of counsel under the *Strickland* standard, the petitioner must demonstrate that (1) "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment and that (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Strickland v. Washington,* 466 U.S. 668, 687, 694 (1984).

Mr. Carter alleges that his trial counsel was ineffective for failure to cross-examine the Commonwealth's two character witnesses about their bias against Mr. Carter. On rebuttal, the Commonwealth presented the testimony of Shawn Carter and Alice Paris. Both witnesses testified that Mr. Carter had a bad reputation in the community for truth and veracity.

At the time of trial, Mrs. Shawn Carter and Mr. Carter had been involved in an adversarial custody battle over their child. Mrs. Shawn Carter had also filed assault charges against Mr. Carter. These facts show a clear bias by

Ms. Shawn Carter against Mr. Carter.

Similarly, Alice Paris and Mr. Carter had been involved in a bitter custody dispute. Ms. Paris had attempted to obtain custody of their child from Mr. Carter. At the time of trial, Ms. Paris was facing child endangerment charges which had been filed by Mr. Carter. These facts show a clear bias on the part of Ms. Paris against Mr. Carter.

In spite of the fact that trial counsel was aware of the bias of these two witnesses, he made no effort to impeach their testimony on the basis of this bias.

Given that the jury had to make a credibility determination between Mr. Carter and Ms. Aliff, it was paramount that trial counsel preserve the integrity of Mr. Carter's testimony. There is no sound trial strategy which can justify counsel's failure to show that these two witnesses, who testified that Mr. Carter had a reputation in the community as a liar, had their own personal agendas against Mr. Carter and had reason to lie about his reputation.

The failure of trial counsel to effectively cross-examine these two witnesses based on their clear bias can not be justified by any trial strategy. Had trial counsel presented evidence of the bias of these two witnesses, there is a reasonable probability that the outcome of the proceeding would have been different. Impeaching a witness for any bias is fundamental in any effective cross-examination. Trial counsel can not be allowed to hide behind a claim of trial tactics when no trial strategy could justify his failure to take action and his failure to take action prejudiced Mr. Carter.

5. TRIAL COUNSEL'S FAILURE TO CALL HARVEY LUTINS AS A WITNESS CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

In order to prove ineffective assistance of counsel under the *Strickland* standard, the petitioner must demonstrate that (1) "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment and that (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Strickland v. Washington,* 466 U.S. 668, 687, 694 (1984).

Mr. Carter alleges that his trial counsel was ineffective for failure to call attorney Harvey Lutins as a witness at Mr. Carter's trial. Mr. Lutins would have testified that, in an unrelated trial, Ms. Aliff testified under oath that Mr. Carter did not rape her.

There is no evidence that could be more damning to the testimony of a prosecutrix than being confronted with her own prior sworn testimony that the crime never occurred. In spite of the potential significance of this testimony, trial counsel never called Mr. Lutins to testify and did not attempt to impeach Ms. Aliff with her prior inconsistent testimony.

The Respondents below attempted to justify trial counsel's failure to present this crucial evidence with a general claim of trial strategy. It is inconceivable that any trial attorney would fail to present this evidence in a case such as this in which credibility of the witnesses was such a critical issue.

The failure of trial counsel to call Mr. Lutins as a witness can not be justified by any trial strategy. Had trial counsel presented evidence of past sworn testimony by the prosecutrix that the rape did not occur, there is more than a reasonable probability that the outcome of the proceeding would have been different.

6. TRIAL COUNSEL'S FAILURE TO REQUEST A CONTINUANCE IN SPITE OF THE FACT THAT TEN WITNESSES WHO WERE UNDER SUBPOENA FAILED TO APPEAR CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

In order to prove ineffective assistance of counsel under the *Strickland* standard, the petitioner must demonstrate that (1) "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment and that (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984).

Mr. Carter alleges that trial counsel was ineffective for failing to request a continuance of the trial. By letter of May 27, 1997, trial counsel requested that subpoenas be issued by the trial court compelling the presence of seventeen witnesses to testify on behalf of Mr. Carter. Ten of the witnesses who were under subpoena failed to appear at the trial of this matter.

During questioning by the trial court prior to trial, Mr. Carter indicated that his witnesses were not present at the trial. Following this statement, trial counsel assured the trial court and Mr. Carter that arrangements had been made for the witnesses to appear at a later time. Following this assertion by trial counsel, Mr. Carter indicated that he was ready for trial. However, ten of the witnesses who were under subpoena to testify for the defense never appeared at trial and therefore could not be called as witnesses.

Article I Section 8 of the Constitution of the Commonwealth of Virginia guarantees the right of an accused to, "...call for evidence in his favor..." Prior to the

trial, Mr. Carter believed that he would be able to exercise this right because he knew his counsel had subpoenaed seventeen witnesses. At the outset of the trial, Mr. Carter expressed his concern that the witnesses had not complied with their subpoenas. Trial counsel assured Mr. Carter and the court that he had arranged to have the witnesses appear to testify later during the trial. However, ten of the witnesses who had been subpoenaed never appeared in court and therefore could not be called to testify on Mr. Carter's behalf.

In its filing in the Circuit Court for the City of Salem, the Respondent argued that, "the transcript reveals that Petitioner advised the court prior to trial ...that proper arrangements had been made to secure the witnesses attendance." In fact, trial counsel, not Mr. Carter, indicated to the court that arrangements had been made regarding the witnesses. Yet in spite of this clear error, the trial court adopted the motion to dismiss as its own findings. This error highlights the fact that the trial court's review was insufficient and demonstrates the danger of a trial court blindly adopting the assertion of the respondent without making a sufficient independent review of Mr. Carter's allegations.

During questioning by the Court prior to trial, Mr. Carter indicated that his witnesses were not present. Following this statement, trial counsel assured the court and Mr. Carter that arrangements had been made for the witnesses to appear at a later time. The affidavit which was filed by trial counsel two and one half years after the trial indicates that it was trial strategy not to continue the trial when material witnesses had failed to appear. However, this affidavit clearly contradicts the colloquy among counsel, Mr. Carter and the trial court. During the colloquy, trial counsel stated that witnesses were not present pursuant to an agreement that they would appear later. This colloquy was prompted when Mr. Carter complained that his subpoenaed

witnesses were not present at trial. The affidavit filed in support of the motion to dismiss established by clear and convincing evidence that trial counsel mislead the trial court and Mr. Carter about his intention to call the subpoenaed witnesses.

These allegations were sufficient to demonstrate ineffective assistance of counsel under *Strickland*. First, counsel failed to effectively represent Mr. Carter by failing to call material and relevant witnesses. Second, Mr. Carter was prejudiced by counsel's failure to call material witnesses who would have presented impeachment testimony against the prosecutrix. Since Ms. Aliff's credibility was the main issue in the case, there is a reasonable probability that the result of the proceeding would have been different if this impeachment testimony had been presented.

CONCLUSION

Mr. Carter requests that this Honorable Court review this petition and the errors stated herein and grant him a hearing during which he will present evidence in support of his petition.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

A copy of the preceding petition was mailed to Thomas D. Bagwell, Office of the Attorney General, 900 E. Main Street, Richmond, Virginia 23219 on November 6, 2000.

VIRGINIA:
IN THE CIRCUIT COURT FOR THE CITY OF SALEM

MICHAEL RENE' CARTER, No. 268447,
Petitioner

v. Case No.: CL00000002

RONALD J. ANGELONE, DIRECTOR,
DEPARTMENT OF CORRECTIONS,
Respondent.

MOTION TO DISMISS

The Respondent, by counsel, moves this Court to deny and dismiss the petition for writ of habeas corpus and says as follows:

1. Petitioner is being detained pursuant to convictions in the Circuit Court of the City of Salem of September 10, 1997 wherein the Petitioner was convicted of malicious wounding and sentenced to eleven years in prison, Case No. CR97-18.

2. Petitioner is attacking the validity of the aforementioned conviction and makes the following allegations in his petition:

(I)(a) Ineffective assistance of counsel in that counsel failed to research Petitioner's case prior to trial and confer with Petitioner and discuss defense; counsel failed to move for a continuance when only seven of the seventeen witnesses appeared;

(I)(b) Ineffective assistance of counsel in that counsel failed to file for discovery and failed to move to dismiss charges at the preliminary hearing for lack of evidence. Attorney Lawrence was absent from the

preliminary hearing;
(I)(c) Ineffective assistance of counsel in that counsel failed to object to the jurisdiction of the general district court who conducted the preliminary hearing;
(II)(a) Ineffective assistance of counsel in that counsel failed to subpoena witnesses who would say that the prosecutrix made similar accusations against others in the past;
(II)(b) Ineffective assistance of counsel in that counsel failed to interview Mark White, Louis Hawkins, Jr. and Randy Hawkins to impeach the prosecutrix;
(III)(a) Ineffective assistance of counsel in that counsel failed to object to the testimony of Sean Carter and Alice Paris based on bias against the Petitioner;
(III)(b) Ineffective assistance of counsel in that counsel failed to object to the testimony of Sean Carter and Alice Paris based on the Petitioner's representative for truth and veracity;
(IV) Ineffective assistance of counsel in that counsel failed to subpoena witnesses to impeach the prosecutrix;
(V) Trial court erred in letting the rape charge go to the jury; ineffective assistance of counsel in failing to raise this issue on appeal;
(VI) Ineffective assistance of counsel for failing to impeach the prosecutrix on prior perjury at an unrelated trial;
(VII) Ineffective assistance of counsel because counsel failed to impeach Lisa Aliff, Paris and Sean Carter on past crimes.

3. Respondent states that Petitioner appealed his convictions to the Court of Appeals of Virginia. The petition was denied on July 1, 1998, Record No. 2215-97-3. Petitioner further appealed to the Supreme Court of Virginia. The Supreme Curt of Virginia refused the petition for appeal on November 3, 1998, Record No. 981543. Rehearing was denied by an Order dated January 8, 1999.

INEFFECTIVE ASSISTANCE OF COUNSEL

4. The first prong of the Strickland test, the "performance" inquiry, requires a showing "that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687 (1984). In judging the particular act or omission, the question is whether it was reasonable considering all the circumstances. Id. at 688. The reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689; Darden v. Wainwright, 477 U.S. 168, 186 (1986).

5. The second prong of the Strickland test, the "prejudice" inquiry, requires a showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." Id. Counsel's errors, even if unreasonable, must be shown to have "actually had an adverse effect on the defense," Id. at 693, not merely that the errors created the "possibility" of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Murray v. Carrier, 477 U.S. 478, 494 (1986) (citations omitted, emphasis in original). See also Lockhart v. Fretwell, 113 S. Ct. 838, 842-844 (1993).

6. Finally, since a petitioner's burden is two-fold, the reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice" issue. Strickland, 466 U.S. at 697. "Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as result." Id. Thus, if a court can dismiss an ineffectiveness claim on the ground of lack of prejudice, the court should do so without scrutinizing counsel's performance. Id

STANDARD OF REVIEW FOR HABEAS CORPUS PLEADINGS

7. The habeas corpus petition must contain all of the allegations of fact which the petitioner relies on in support of his habeas corpus claim. Va. Code §8.01-654B2. See also Penn v. Smith, 188 Va. 367, 370, 49 S.E.2d 600, 601 (1948) ("it is elementary that a petition of this nature [habeas corpus] must allege facts and that mere conclusions or opinions of the pleader will not suffice to make out a case.")

Not only must the petitioner allege facts to show that he has a valid claim, he must allege facts to show that he has specifically been prejudiced. Penn, 188 Va. at 372, 49 S.E.2d at 602 ("the petition, however, alleges no specific fact to show that he suffered any prejudice as a result of such representation.") See also Fitzgerald v. Bass, 6 Va. App. 38, 44, 366 S.E.2d 615, 618 (1988), cert. denied, 493 U.S. 945 (1989), (the habeas petition must allege sufficient facts which would support the conclusion of law advanced and mere conclusions or opinions of the pleader will not suffice). See also Bassette v. Thompson, 915 F.2d 932, 940-941 (4th Cir.) (199) cert. denied, 499 U.S. 982 (1991) and Turner v. Bass, 753 F.2d 342, 347, (4th Cir.) (1985, sentence vacated 476 U.S. 28 (1986). ("[N]o hearing is required if the facts

alleged by the petitioner and assumed to be true are insufficient to support a claim.")

A habeas petition which consists of bald conclusory claims without any factual support is insufficient. As the court said in United States v. Schaflander, 743 F.2d 714 (9th Cir. 1984):

> [T]he appellants have not made a sufficient factual showing that would require an evidentiary hearing; they have not produced affidavits or sworn statements from any of the witnesses or from counsel. In the absence of the necessary factual showing, their allegations remain "merely conclusory statements," which, in the circumstances of this case, the District Court properly rejected.

Id. at 721. See also Ross v. Estelle, 694 F.2d 1008, 1011 (5th Cir. 1983) (bald. unsupported assertions do not state a claim for relief); Nickerson v. Lee, 971 F.2d 1125, 1136 (4th Cir. 1992) ("in order to obtain an evidentiary hearing on an ineffective assistance of counsel claim – or, for that matter, on any claim – a habeas petitioner must come forward with some evidence that the claim might have merit. Unsupported, conclusory allegations do not entitle a petitioner to an evidentiary hearing.")

8. In response to allegation (I)(a), Respondent states that trial counsel conferred with the Petitioner on numerous occasions prior to trial. See Exhibits 1 and 2, copies of Affidavits of trial counsel. Moreover, trial counsel did research Petitioner's case prior to trial. See Exhibits 1 and 2.

Aside from the fact that counsel did properly research and confer with the Petitioner prior to trial, Petitioner has failed to allege and prove any prejudice as a result of counsel's alleged ineffectiveness. Consequently, his claim is deficient.

9. Moreover, the transcript reveals that the Petitioner advised the court prior to trial that he was entirely satisfied with his attorney's performance and that proper arrangements had been made to secure the witnesses' attendance. See Tr. pp. 7-8. Petitioner is bound by his statements to the court. Anderson v. Warden, 222 Va. 511, 281 S.E.2d 885 (1981).

10. In response to allegation (I)(b), Respondent states that Petitioner has failed to allege any prejudice as a result of counsel's failure to move for discovery. Moreover, Petitioner has failed to allege that there was any favorable evidence to be obtained as a result of discovery.

Aside from the fact that Petitioner has failed to allege any prejudice, counsel need not have filed a motion for discovery since the Commonwealth's file was open to counsel. See Exhibits 1 and 2, copies of Affidavits from trial counsel. Petitioner has shown neither ineffectiveness nor prejudice.

In response to Petitioner's claim (I)(b) where he alleges that counsel failed to move to dismiss charges at the preliminary hearing for lack of evidence, the Respondent states that Petitioner can show no prejudice. Even assuming *arguendo* that the charges may have been dismissed at the preliminary hearing, they could still have been reinstated by indictment if the Commonwealth desired it. See Moore v. Commonwealth, 218 Va. 388, 237 S.E.2d 187 (1977).

11. In response to allegation (I)(d), Respondent states that counsel made a tactical decision not to object to the preliminary hearing jurisdiction. See Exhibits 1 and 2. Had counsel successfully moved to dismiss the preliminary hearing, the Commonwealth would have been free to indict the Petitioner without a preliminary hearing. See Moore v. Commonwealth, supra. Petitioner has demonstrated neither ineffectiveness of counsel nor prejudice.

12. In response to (II)(a), (II)(b) and (IV), Respondent states that counsel fully investigated Petitioner's

witnesses. In most instances, the witnesses did not corroborate what the Petitioner advised counsel that the witnesses would say. Moreover, counsel had what they believed to be the witnesses necessary for the defense. See Exhibits 1 and 2, copy of Affidavits. It was counsel's tactical decision as to which witnesses to use. Such a decision is not subject to second-guessing in a petition for writ of habeas corpus. See Abbott v. Peyton, 211 Va. 484, 178 S.E.2d 521 (1971) and Johnson v. Riddle, 222 Va. 428, 433, 281 S.E.2 843, 846 (1981). See also Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991).

Aside from the fact that counsel made a strategic decision as to which witnesses to call, Petitioner failed to proffer to the court affidavits of the witnesses to prove any prejudice. Petitioner has shown neither ineffectiveness of counsel nor prejudice.

13. In response to allegations (III)(a), (III)(b), (VI) and (VII), the Respondent states that cross-examination of witnesses is a matter of trial tactics not subject to second-guessing in a petition for writ of habeas corpus. Sallie v. State of North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) and United States v. Clayborne, 509 F.2d 473, 479 (D.C. Cir. 1974).

In further response to allegation (III)(a), the record shows that both Sean Carter and Alice Paris had each had a child by the Petitioner. See Tr. pp. 150-52. Certainly any bias based on the fact that the witnesses were testifying against the defendant based on his reputation for truth and veracity would have been evident to the jury by those facts. Petitioner has shown neither prejudice nor ineffectiveness of counsel.

In further response to allegations (III)(b), the Respondent states that the record reveals that Sean Carter was shown to have only knowledge of the Petitioner's reputation in the Salem community. Consequently, there is no merit to that part of Petitioner's allegation. Additionally,

the examination of witnesses if a matter of trial tactics. Finally, Petitioner has demonstrated no prejudice as a result of counsel's alleged ineffectiveness.

14. In response to allegation (V) where Petitioner alleges that the trial court erred in letting the rape case go to the jury, the Respondent states that this is a matter which must be raised at trial and on appeal and, therefore, not cognizable in a petition for writ of habeas corpus. Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974).

In response to Petitioner's claim in (V) that counsel was ineffective for not raising this issue on appeal, Respondent states that those allegations to be raised on appeal are a matter of trial tactics and not subject to second-guessing in a petition for writ of habeas corpus. See Jones v. Barnes, 463 U.S. 745, 751-52 (1983). See also Burger v. Kemp, 483 U.S. 776 (19876).

In any event, the record is clear that the Commonwealth's evidence, if believed, was sufficient for the jury to find that the Petitioner committed rape. Petitioner has shown neither ineffectiveness of counsel nor prejudice.

15. In response to allegations in (VI) and (VII), Respondent states that Petitioner has proffered no facts in support of his claims to demonstrate any prejudice. Moreover, the examination of witnesses is a matter of trial tactics. See Sallie, Clayborne, supra. Petitioner has shown neither ineffectiveness nor prejudice.

16. Respondent denies each and every allegation of the petition not specifically admitted herein.

17. Respondent, states that Petitioner's claims are fully developed in the pleadings, therefore, no hearing is necessary.

WHEREFORE, the Respondent prays that the petition be denied and dismissed.

Respectfully submitted,
RONALD J. ANGELONE,
DIRECTOR, DEPARTMENT
OF CORRECTIONS
By: _____
Counsel

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CERTIFICATE OF SERVICE

On February 8, 2000 a copy of this Motion to Dismiss and a proposed Order were mailed to Michael Rene' Carter, No. 268447, Haynesville Correctional Center, P.O. Box 129, Haynesville, Virginia 22472.

_____
Thomas D. Bagwell
Senior Assistant Attorney General
Criminal Litigation Section

TIN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF VIRGINIA
Roanoke Division

MICHAEL R. CARTER,

Case No.: 7:00CV00862

Petitioner,

v.

ORDER

RONALD ANGELONE, DIRECTOR, DEPARTMENT OF CORRECTIONS,

By: Jackson L. Kiser
Senior United States District Judge

Respondent.

Before the Court is Respondent's Motion to Dismiss [Document 5]. For the reasons stated in the attached Memorandum Opinion, the Motion is **GRANTED.**

The Clerk is directed to send certified copies of this Order to all counsel of record, and to Michael R. Carter. Any pending motions are to be dismissed as moot and the Clerk is directed to strike this case from the docket.

Entered this 10th day of August, 2001.

_____
Senior United States
District Judge

TIN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF VIRGINIA
Roanoke Division

MICHAEL R. CARTER,

Case No.: 7:00CV00862

Petitioner,

v. **MEMORANDUM OPINION**

RONALD ANGELONE, DIRECTOR, DEPARTMENT OF CORRECTIONS,

By: Jackson L. Kiser
Senior United States District Judge

Respondent.

Background

On February 21, 1997, the Grand Jury for the City of Salem returned a four count indictment against Michael R. Carter ("Carter"), charging Carter with rape, abduction, malicious bodily injury, and statutory burglary. Prior to trial, the Commonwealth of Virginia moved to nolle prosequi the charge of abduction. At the conclusion of the evidence, the Court granted Carter's motion to strike the charge of statutory burglary. Thus, the charges of rape and malicious bodily injury were the sole remaining counts that made their way to the jury.

At trial, the Commonwealth relied mainly upon the testimony of the complaining witness, Lisa Aliff ("Aliff"), who testified to a series of incidents that allegedly occurred between herself and Carter. The Commonwealth also presented testimony in its case-in-chief from Aliff's mother and father, as well as a detective in the case. The Defense called numerous witnesses, including the Defendant himself, in an effort to impeach Aliff's credibility. During rebuttal, Commonwealth called two character witnesses who testified to Carter's bad reputation for truth as well as a medical

examiner who testified regarding injuries found on Aliff during her examination at the hospital.

Given this evidence, the jury found Carter guilty of malicious bodily injury and not guilty of rape. The jury recommended a sentence of eleven years incarceration and a $20,000 fine. On September 10, 1997, the trial court imposed the jury's recommended sentence of eleven years.

Carter appealed his conviction on the malicious bodily injury charge to the Court of Appeals of Virginia on November 10, 1997. The appeal was denied on March 24, 1998. Carter then appealed his conviction to the Supreme Court of Virginia on July 29, 1998. The appeal was denied on November 3, 1998. Lastly, Carter's motion for rehearing before the Supreme Court of Virginia was denied on January 8, 1999.

Carter filed a petition for writ of habeas corpus in the Circuit Court for the City of Salem on January 7, 2000. Respondent Ronald Angelone, Director of the Department of Corrections, ("Angelone"), filed a Motion to Dismiss Petition for Writ of Habeas Corpus on February 8, 2000. The Circuit Court of the City of Salem denied Carter's petition without a hearing on February 11, 2000. Carter filed a timely appeal to the Supreme Court of Virginia, which was denied on August 7, 2000.

Carter now files a Petition for Writ of Habeas Corpus ("Habeas Petitioner") pursuant to 28 U.S.C. §2254. Respondent Angelone now files a Motion to Dismiss, and that Motion is granted for the reasons that follow.

Analysis

Carter delineates several issues in his Habeas Petition, none of which survive the Motion to Dismiss.

I. Trial Court's Dismissal of Earlier Habeas Petition

Carter first argues that the trial court erred in its February 8, 2000 order granting Respondent's Motion to Dismiss because the court failed to make findings of fact and conclusions of law as required in Va. Code 8.01-654(B)(5).

The statute requires the court to "give findings of fact and conclusions of law following a determination on the record..." Carter argues that the state court failed to fulfill its duty, as is evidenced by the fact that the state court merely adopted the argument of the Commonwealth. As such, Carter requests an order requiring the Circuit Court to conduct an independent review of his habeas petition and render a more detailed decision that complies with Va. Code 8.01-654(B)(5).

Petitioner's position on this issue is quite problematic. First, the trial court's review of these issues is entitled to great deference. Pursuant to the Antiterrorism Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §§ 2254(d)-(e), this Court must treat the state court decision with deference unless the decision was (1) contrary to, or an *unreasonable* application of, a clearly established U.S. Supreme Court decision, or (2) based on an *unreasonable* determination of facts. Moreover, §2254(e)(1) contains no exception for the presumption of correctness. In sum, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 2000 LEXIS 2836 at 173. Moreover, the law holds that even a summary single paragraph dismissal of a habeas petition without hearing is entitled to this level of deference under the AEDPA. *Wright v. Angelone*, 151 F.3d 151, 157 (4th Cir. 1998). Since I find that the state court did not conduct an independent review and deny the habeas petition, albeit simply "for the reasons stated in the motion to dismiss," I accord that the action due deference. *Weeks v. Angelone*, 176 F.3d 249, 259 (4th Cir. 1999), *aff'd* 120 S.Ct. 727 (2000) (requiring deference to state court orders, even those that are summary in nature).

Even were I to have agreed with Petitioner on this

issue, I can find no basis for granting the relief that Carter seeks. Ordering the state court to conduct an independent review of the habeas petition so as to comply with Va. Code 8.10-654(B)(5) effectively constitutes a mandamus to the state court. Yet, this Court has no authority to mandamus state court judges. *Haggard v. Tennessee,* 421 F.2d 1384 (6th Cir. 1970); *Moyer v. Clerk, DeKalb County Sup. Ct.,* 474 F.2d 1275 (5th Cir. 1973). Indeed, whether the state court complied with the state law on reviewing habeas petitions is a matter of state law that is not subject to the power of the federal courts to issue a writ of habeas corpus. *Pulley v. Harris,* 465 U.S. 37 (1984); *Brant v. State of Md.,* 848 F.2d 492 (4th Cir. 1998). In sum, this Court lacks jurisdiction to comply with Carter's request in Count I of his habeas petition.

II. Ineffective Assistance of Counsel Claims Regarding Witnesses

Petitioner also raises numerous arguments that point out alleged failures by his trial counsel in defending his case. Petitioner contends that each of these failures would have strongly impacted his case. These claims can be summarized as follows:

* Trial counsel failed to interview potential witness Randall Monger ("Monger"). Petitioner contends that Aliff had previously made false charges of rape against Monger that were very similar to those pressed in Carter's case. Despite repeatedly asking his lawyers to interview Monger and subpoena him for trial, Carter contends that trial counsel never so much as contacted Monger for an interview.
* Trial counsel failed to interview potential witnesses Mark White, Lewis Hawkins, Jr. and Randy Hawkins. Aliff accused Lewis Hawkins of assault and battery; Randy Hawkins of assault; and Mark White of trespassing and stalking. Apparently, all of these charges were bogus and did not result in

any convictions. Petitioner contends that he told his trial counsel of these witnesses, but the lawyers failed to interview them.

* Trial counsel failed to cross-examine Commonwealth witnesses regarding bias. The Commonwealth presented two witnesses who testified to Carter's bad reputation in the community for truth and veracity. Carter notes that he was involved in bitter child custody disputes with both of these witnesses, providing grounds for bias in their testimony. Petitioner contends that the lack of cross-examination against these two witnesses constituted ineffective assistance.

* Trial counsel failed to call Mark White ("White") as a witness. Carter contends that White would have testified under oath that Aliff told him that Carter had not raped her. Although Carter was ultimately found no guilty of the rape charge, Carter contends that this admission would undermine Aliff's credibility on the whole and would have changed the outcome of his conviction for malicious bodily injury.

In order to prove ineffective assistance of counsel, the petitioner must establish: (1) that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment"; and (2) that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668, 687, 694 (1984).

Given this standard, Carter's current petition is insufficient to warrant relief on the ineffective assistance of counsel claims. Petitioner fails to proffer testimony that omitted witnesses would have given, and that absence is fatal to his petition under the heightened standards of *Strickland.*

"Without a specific affirmative showing of what the missing evidence or testimony would have been, a 'habeas court cannot even begin to apply *Strickland's* standards' because 'it is very difficult to assess whether counsel's performance was deficient, and nearly impossible to determine whether the petitioner was prejudiced by any deficiencies in counsel's performance." *Bassette v. Thompson,* 915 F.2d 932, 40-41 (4th Cir. 1990) (citations omitted). Without such factual evidence before this Court, the petition represents nothing more than mere conclusory statements not warranting relief on review.

Moreover, Petitioner is unable to supplement the record with additional evidence unless he can demonstrate that such evidence was unavailable at the time he filed his habeas petition in state court. Indeed, 28 U.S.C. §2254(d)(2) bars any facts not presented to the state court from being filed before this Court. As such, these claims are insufficient as a matter of law and must dismissed.

Lastly, even if Carter's habeas petition were able to rely on statements from the potential witnesses, there are various reasons that this factor would not meet the *Strickland* requirements of performance and prejudice. The trial counsel has stated in affidavits that many of the potential witnesses of whom Carter advised them relayed information different from that which Carter indicated they would state. Moreover, trial counsel has indicated that their decisions not to cal certain witnesses were the results of tactical strategy, a contention not subject to second-guessing at the habeas stage. *Bunch v. Thompson,* 949 F.2d 1354 (4th Cir. 1991). Lastly, Carter fails to demonstrate any evidence of prejudice to him from counsel's actions. Indeed, he escaped guilt on three of four original charges and the defense witnesses called were insufficient to impeach Aliff. Since the errors (if any) made by counsel were not glaring and since there is no solid evidence of prejudice to Carter, the habeas petition fails under *Strickland.*

III. Ineffective Assistance of Counsel Regarding Failuer to Request Continuance

Lastly, Carter claims that his counsel's failure to request a continuance at the outset of his trial constituted ineffective assistance. Trial counsel had requested that seventeen subpoenas be issued for witnesses to testify on Carter's behalf; yet, ten of the witnesses never appeared in court and therefore could not be called as witnesses. These facts, Carter contends, demonstrates the ineffectiveness of his counsel.

Reference to the trial transcript demonstrates how fallacious this argument is. Simply stated, Carter gave his free consent to proceed with the trial despite the absence of witnesses. The court specifically asked Carter whether he was satisfied that the witnesses he needed were present or would be when needed; Carter replied affirmatively. The trial court then asked him directly "Are you ready for trial today?"; Carter replied, "Yes, Sir." Since Carter accepted the situation of the witness availability and elected to proceed, I find that any habeas request based on the unavailability of witnesses is unwarranted.

The Clerk is directed to send certified copies of this Memorandum Opinion to all counsel of record, and to Michael R. Carter.

Entered this _____ day of August, 2001.

_____

Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MICHAEL R. CARTER,
Petitioner,

v.

Civil Action
No. 7:00-cv-
00862

RONALD ANGELONE, DIRECTOR
DEPARTMENT OF CORRECTIONS,
Respondent.

NOTICE OF APPEAL

COMES NOW the Petitioner Michael R. Carter, by counsel, and files the following as his appeal of this Court's dismissal of his petition for habeas corpus.

Respectfully Submitted,
BY:_____
Counsel

Michael Morchower
VSB No. 08632
Morchower, Luxton and Whaley
Nine East Franklin Street
Richmond, Virginia 23219
(804) 643-0147
(804) 648-5514 FAX

CERTIFICATE

I hereby certify that a copy of the preceding Notice of Appeal was mailed first-class postage pre-paid to Office of the Attorney General, 900 E. Main Street, Richmond, Virginia 23219 this 7th day of September, 2001.

_____

INFORMAL BRIEF

1. **Jurisdiction (for appellants only)**

A. What is the name of the court from which you are appealing?

United States District Court, Western Dist., Roanoke, VA.

B. What is the date(s) of the order or orders you are appealing?

August 10, 2001.

2. **Timeliness of appeal (for prisoners only)**

When did you give your notice of appeal to a prison officer for mailing to the United States District Court? Enter the exact date:

3. **Issues on Appeal**

Use the following spaces to tell the United States Court of Appeals for the Fourth Circuit why the judgment under review should be affirmed, reversed, or vacated and remanded. Appellant must provide a brief summary of the facts and arguments that support their position that the judgment under review was wrong. Appellees may rely on the facts and law stated in that judgment or may advance alternative grounds for affirmance or dismissal. The parties may cite case law, but it is not required.

Issue 1.

The trial court erred in granting the respondent's motion to dismiss as the trial court failed to make findings of fact and conclusions of law as required by Va. Code 8.01-654.

Supporting Facts and Argument.

The trial court adopted the assertions of the respondent without comment and without allowing a hearing in spite of the fact that the respondent's filing as contradicted by the record in the case.

Issue 2.

Trial counsel's failure to interview potential witness Randall Monger constituted ineffective assistance and could not be justified by trial strategy.

Supporting Facts and Argument.

Trial counsel knew that the prosecutrix had made similar false charges against a potential witness named Randall Monger yet counsel failed to interview or subpoena Mr. Monger.

Issue 3.

Trial counsel was ineffective for failing to interview potential witnesses Mark White, Lewis Hawkins and Randy Hawkins as such failure can not be excused as trial tactics.

Supporting Facts and Argument.

The prosecutrix falsely accused Richard Hawkins of stalking; The prosecutrix falsely accused Randy Hawkins of assault; The prosecutrix falsely accused Mark White of trespassing and stalking; trial counsel did not interview any of these witnesses despite the Petitioner's requests that he do so.

Issue 4.

Trial counsel failed to cross-examine the character witnesses who testified against Petitioner in spite of the fact that he was aware of their bias against the Petitioner.

Supporting Facts and Argument.

Mrs. Shawn Carter testified against Mr. Carter – trial counsel failed to cross-examine her regarding the on-going custody dispute she had with Mr. Carter – Alice Paris testified against Mr. Carter – trial counsel failed to question her about child endangerment charges that Mr. Carter had filed against her.

Issue 5.

Trial counsel's failure to call Harvey Lutins as a witness constituted ineffective assistance and could not be justified by trial strategy.

Supporting Facts and Argument.

Counsel for petitioner was aware that Mr. Lutins, a local attorney, could have been called to testify that the prosecutrix had previously testified under oath that Mr. Carter did not rape her. In spite of these facts, trial counsel never called Mr. Lutins and never impeached the victim with her prior inconsistent testimony.

Issue 6.

Trial counsel's failure to request a continuance in spite of the fact that ten witnesses who were under subpoena failed to appear for trial constituted ineffective assistance and could not be justified by trial strategy.

Supporting Facts and Argument.

At the outset of trial Mr. Carter indicated to the Court that his witnesses were not present in court. Trial counsel assured the court that he had made arrangements for the witnesses to appear later. Based on this representation, Mr. Carter agreed that the trial could proceed. Trial counsel now admits in the affidavit filed in state court that he had decided not to call the witnesses, but had not informed Mr. Carter of that fact.

4. **Relief Requested**

What do you want the Court of Appeals to do? Identify exactly the relief you seek.

A remand to United States District Court for an evidentiary hearing.

5. **Prior Appeals (for appellants only)**

A. Have you filed other appeals in this court?

____Yes _____ No

B. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?

_____

Signature

[Notarization Not Required]

_____

[Please Print Your Name Here]

CERTIFICATE OF SERVICE

I certified that on 11/13/01 I mailed a complete copy of this Informal Brief and all attachments to all parties, addressed as shown below.

_____

Signature

[Notarization Not Required]

[List here each party's name and complete mailing address]
Thomas Bagwell
Office of the Attorney General
900 E. Main Street
Richmond, Virginia 23219

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-7552

MICHAEL R. CARTER,
Petitioner-Appellant,
versus
RONALD J. ANGELONE,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Jackson L. Kiser, Senior District Judge. (CA-00-862)

Submitted: February 27, 2002 Decided: March 18, 2002

Before LUTTIG, KING, and GREGORY, Circuit Judges.

D smissed by unpublished per curiam opinion.

Michael Morchower, MORCHOWER, LUXTON & WHALEY, Richmond, Virginia; Christopher Campbell Booberg, THORSEN, MARCHANT & SCHER, L.L.P., Richmond, Virginia, for Appellant. Thomas Drummond Bagwell, Assistant Attorney General, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Michael R. Carter seeks to appeal the district court's order denying relief on his petition filed under 28 U.S.C.A. §2254 (West 1994 & Supp. 2001). We have reviewed the

record and the district court's opinion and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. See Carter v. Angelone, No. CA-00-862 (W.D. Va. Aug. 10, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-7552

MICHAEL CARTER,
Petitioner – Appellant,
v.
RONALD ANGELONE,
Respondent -Appellee.

Appeal From The United States District Court
For The Eastern District of Virginia

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Michael Morchower
Morchower, Luxton and Whaley
Nine East Franklin St.
Richmond, Virginia 23219
(804) 643-0147

INTRODUCTION

In the judgment of appellant's counsel, this Petition should be granted because the decision of this Court's panel dated March 18, 2002, overlooks material facts.

ARGUMENT I

THE PANEL OF THIS COURT ERRED IN AFFIRMING THE DISTRICT COURT AS THE DISTRICT COURT DENIED THE PETITION IN SPITE OF THE FACT THAT THE STATE COURT DECISION DID NOT CONTAIN REQUIRED FINDINGS OF LAW AND FACT

Following his conviction, Mr. Carter sought habeas corpus review in the Circuit Court for the City of Salem. The Circuit Court dismissed Mr. Carter's petition without making the findings of law and fact that are required by Virginia Code Section 8.01-654. The District Court erred in denying Mr. Carter's petition in the face of this breach of duty by the Circuit Court for the City of Salem.

ARGUMENT II

THE PANEL OF THIS COURT ERRED IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THE PETITION AS TRIAL COUNSEL FAILED TO INTERVIEW POTENTIAL WITNESSES

Mr. Carter informed trial counsel that a witness named Randall Monger was available to testify that the prosecutrix made similar false charges against him. In spite of the potential significance of this testimony and evidence, trial counsel failed to interview this witness. This failure on the part of trial counsel represents ineffective assistance of counsel that can not be justified as a trial tactic. The District Court erred in denying the petition given the seriousness of this breach of counsel's duty to the petitioner.

ARGUMENT III

THE PANEL OF THIS COURT ERRED IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THE PETITION AS TRIAL COUNSEL FAILED TO

INTERVIEW POTENTIAL WITNESSES MARK WHITE, LEWIS HASKINS AND RANDY HAWKINS

The prosecutrix falsely accused Mark White, Lewis Haskins and Randy Hawkins of crimes that they did not commit. Counsel did not interview any of these potential witnesses in spite of petitioner's requests that he do so. This failure on the part of trial counsel constitutes ineffective assistance of counsel. There is no trial tactic which could justify this failure by counsel. The District Court erred in denying the petition given this clear breach of counsel's duty to the petitioner.

ARGUMENT IV

THE PANEL OF THIS COURT ERRED IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THE PETITION AS TRIAL COUNSEL FAILED TO CROSS-EXAMINE CHARACTER WITNESSES AGAINST PETITIONER IN SPITE OF HIS KNOWLEDGE OF THEIR OBVIOUS BIAS AGAINST PETITIONER

Mrs. Shawn Carter and Alice Paris both testified against the petitioner with regard to his character. Trial counsel failed to examine Mrs. Shawn Carter about the custody dispute that she had with Mr. Carter at the time that she testified. Trial counsel also failed to cross-examine Alice Paris regarding the child endangerment charges that Mr. Carter had filed against her. There is no trial tactic or strategy which could justify counsel's failure to effectively cross examine these witnesses with information which would reveal their bias against Mr. Carter. The District Court erred in denying the petition given counsel's clear breach of his duty to effectively represent the petitioner.

ARGUMENT V

THE PANEL OF THIS COURT ERRED IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THE PETITION AS TRIAL COUNSEL FAILED TO CALL WITNESS HARVEY LUTINS

The petitioner's trial counsel was aware that Attorney Harvey Lutins was available to testify that the prosecutrix testified under oath that Mr. Carter never raped her. In spite of this knowledge and the importance of this testimony in potentially impeaching the prosecutrix, trial counsel never called Mr. Lutins as a witness for Mr. Carter. Trial counsel's failure to call Mr. Lutins as a witness can not be justified. Trial counsel failed to render effective assistance to Mr. Carter. The District Court erred in dismissing the petition in light of the evidence of violation of petitioner's constitutional rights.

ARGUMENT VI

THE PANEL OF THIS COURT ERRED IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THE PETITION AS TRIAL COUNSEL FAILED TO INFORM THE PETITIONER THAT HE NEVER INTENDED TO CALL A NUMBER OF WITNESSES ON HIS BEHALF

At the outset of trial, Mr. Carter expressed concern to the Court that a large number of his witnesses were not present. Trial counsel assured Mr. Carter and the court that he had made arrangements for the witnesses to appear to testify at a later time. Based on this representation, Mr. Carter agreed that the trial could proceed. In the affidavit which he filed in response to petitioner's state habeas corpus petition, trial counsel admits that he never intended to call any of the witnesses who were not present and that he never

informed Mr. Carter of this fact. While these actions might possibly be broadly construed as trial tactics, the petitioner submits that trial tactics based on defrauding the petitioner into waiving his right to call witnesses in his defense constitute ineffective assistance of counsel. The District Court erred in denying the petition in light of this evidence of fraud on the part of trial counsel.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated, Mr. Carter respectfully petitions this Court for a rehearing and for a rehearing en banc.

Respectfully Submitted,
MICHAEL CARTER
By:_____
Counsel

Michael Morchower
Morchower, Luxton and Whaley
9 E. Franklin Street
Richmond, Virginia 23219
(804) 643-0147

CERTIFICATE OF SERVICE

In accordance with Rule 25 of the Rules of the U.S. Court of Appeals for the Fourth Circuit, I hereby certify that I have on this 22nd day of March, 2002, filed the required copies of the Petition for Rehearing and Petition for Rehearing En Banc in the Clerk's Office, and have mailed the required copies of the Petition for Rehearing and Petition for Rehearing En Banc by first-class postage U.S. Mail pre-paid to Thomas Drummond Bagwell, Esquire, Office of the Attorney General, 900 E. Main Street, Richmond, Virginia 23219.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 14, 2002

No. 01-7552
CA-00-862

MICHAEL R. CARTER,
Petitioner-Appellant,

v.

RONALD J. ANGELONE,
Respondent-Appellee.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,
/s/ Patricia S. Connor
CLERK